

STATEMENT OF SCOPE

Department of Natural Resources

Rule No.: WY-18-16

Relating to: Revisions to chapters NR 102, 106, 205 and NR 207 and other related regulations for the purpose of updating Wisconsin's antidegradation policy and implementation procedures.

Rule Type: Permanent

1. Finding/nature of emergency (Emergency Rule only):

The rules will be proposed as permanent rules.

2. Detailed description of the objective of the proposed rule:

The objective of the proposed rule is to update Wisconsin's antidegradation policy and implementation procedures to establish an effective, transparent process for conducting antidegradation reviews that is consistent with federal regulations. Antidegradation is a component of water quality standards and is established to protect existing uses and to protect high quality waters from degradation unless it is necessary. States are required to adopt an antidegradation standard and implementation procedures that are consistent with the Clean Water Act and federal regulations promulgated under the Act (33 USC 1313(d)(4)(B) and 40 CFR 131.12). There are also antidegradation procedures that apply to the Great Lakes Basin in 40 CFR 132 Appendix E.

Antidegradation does not prohibit all activities that would lower water quality in high quality waters, but instead requires a demonstration that the lowering of water quality is necessary and would result in social or economic development in the area where the waterbody is located.

The purpose of these rule revisions are to ensure that Wisconsin's narrative antidegradation standard and implementation procedures are consistent with revised federal regulations (40 CFR 131.12) that took effect on August 21, 2015 (Federal Register Vol. 80, No. 162) . The rule revisions will also include additional antidegradation policies and procedures that apply in the Great Lakes Basin (40 CFR 132, Appendix E). The following list highlights some of the areas that will be addressed in the rule revisions to ensure Wisconsin's policies are consistent with federal regulations and policies:

- Clarify when an antidegradation review is needed and what the review entails.
- Identify which high quality waters are subject to antidegradation review
- Reevaluate what constitutes "significant lowering of water quality"
- Identify public participation requirements
- Remove antidegradation review exemptions for changes in water quality criteria that result in less stringent limits
- Establish guidelines for determining activities that result in important social or economic development

- Revise the “analysis of alternatives” process. During an antidegradation review, the range of practicable alternatives that would prevent or lessen the degradation associated with the lowering of water quality must be evaluated.
- Evaluate and define the applicability of antidegradation implementation procedures to Wisconsin Pollutant Discharge Elimination System (WPDES) general permits and concentrated animal feeding operations (CAFOs) and stormwater WPDES permits
- Include additional antidegradation policies and procedures for antidegradation reviews in the Great Lakes Basin if necessary

The antidegradation implementation procedures currently in NR 207 are unclear and outdated. In the proposed rule, the Department will establish a transparent procedure for determining where an antidegradation review is needed, under which circumstances, and what this review entails.

Additional changes to associated rules may be pursued which are reasonably related to those discussed here such as revisions to policies related to general permits, CAFOs, and stormwater permits and the development of WPDES permit implementation procedures for the revised procedures. The department will also consider revisions to the definition of new dischargers in various permitting chapters to ensure consistency with federal regulations and to provide consistency in permit implementation procedures such as antidegradation reviews, compliance schedules and variances.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Federal requirements: the United States Environmental Protection Agency (EPA) revised its antidegradation regulations in 40 CFR 131.12 in 2015. The Great Lakes Initiative Regulations in 40 CFR 132 and Appendices were promulgated in 1995.

Prior to August 21, 2015, the EPA established an antidegradation policy that consists of three levels of protection:

Tier 1: Applies to all waters and requires that water quality is necessary to support existing uses.

Tier 2: Applies to waters where quality exceeds the level needed to support fish and aquatic life, and recreation, and requires a demonstration that lowering of water quality is necessary to support important social and economic development in the area where the waterbody is located.

Tier 3: Applies to Outstanding and Exceptional National Resource Waters and requires that water quality in these waters be maintained and protected.

In their 2015 revised regulations, the EPA identified two approaches for implementing antidegradation. In the waterbody-by-waterbody approach, States identify parameters for which water quality is better than necessary to support uses and conduct an antidegradation review for any new or increased discharge on one of these waterbodies. In the parameter-by-parameter approach, States identify parameters for which water quality is better than necessary to support uses and conduct an antidegradation review for every parameter that exceeds this level. In the preamble to the federal register, EPA made comparisons between the two antidegradation approaches. During the rulemaking process, the Department will consider both of these options and select an approach for reviews.

State Antidegradation Requirements: The Department’s existing narrative antidegradation standard is in s. NR 102.05(1)(a) and was established in 1973. Wisconsin’s procedures for implementing the antidegradation standard on point sources is found in chapter NR 207 and were initially established in 1989. In 1997, there were revisions to chapter NR 207 to implement the Great Lakes Initiative Regulations in 40 CFR 132 and Appendices. However, the Department’s current standard and implementation procedures do not reflect the three tiers that were included previous EPA regulations.

As part of the proposed rule, the Department will establish a process to determine when an antidegradation review is triggered and the scope of the review. . Both the waterbody-by-waterbody and parameter-by-parameter approaches will be evaluated during the rule making process to ensure that the selected approach is efficient and provides adequate protection to the State's high quality waters.

The alternative to the proposed approach is to not revise the antidegradation policy and implementation procedures at this time. Not changing the rules will lead to more complication and result in a greater workload for staff because they will not have a standardized process to follow. Pursuant to Wisc. Stat. 283.001(2), 283.11(2), 283.31(3)(d)(1), the department is required to promulgate rules and administer a permit program that complies with the Clean Water Act and federal regulations promulgated pursuant to this Act. Thus, Wisconsin's antidegradation procedures must be consistent with the Clean Water Act and federal regulations.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Revisions to the antidegradation policy and implementation procedures will be promulgated under Wis. Stats 281.15:

- Wis. Stat. s. 281.15 mandates that the Department promulgate by rule water quality standards, including water quality criteria and designated uses.
- Wis. Stat. s. 283.31(3) and (4) state that the department may issue a permit upon condition that the permit contains limitations necessary to comply with any applicable federal law or regulation, state water quality standards, and total maximum daily loads.
- Wis. Stat. s. 283.13(5) states that the department shall establish more stringent limitations than required under subs (2) and (4) when necessary to comply with water quality standards.
- Wis. Stat. s. 283.37 gives the Department authority to promulgate rules regarding permit applications.
- Wis. Stat. s. 283.55 gives the Department authority to impose monitoring and reporting requirements.
- Wis. Stat. s. 283.83 requires that the Department establish a continuing planning process and that plans shall include implementation procedures including compliance schedule for revised water quality standards.
- Wis. Stat. s. 227.11(2) provides the Department with the authority to promulgate rules that are necessary to administer the specific statutory directives in chapter 283.

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

3,300 hours – total for 3 years

6. List with description of all entities that may be affected by the proposed rule:

Business/industry and Municipalities: Businesses, industries, and municipalities that discharge to surface waters and hold a WPDES permit or may obtain a WPDES permit in the future may be affected by this rule. The revisions will provide a clearer antidegradation review process and clearer, more consistent definitions for new dischargers.

State government: The rule update will enable WDNR to gain efficiencies in several internal processes allowing state funds to be used more economically.

Public: The public will benefit from a more transparent approach to protecting Wisconsin's high quality water and the ability to participate in the selection of these waters.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

33 USC s. 1313(c) (section 303(c) of the Clean Water Act) requires that states periodically review and modify or adopt, if necessary, water quality standards. This requirement applies to all surface waters in the state.

33 USC s. 1313(b) provides that the EPA may promulgate water quality standards if a state fails to promulgate a standard in accordance with the timeframes established 33 USC 1313(a).

33 USC s1313(d)(4)(B) (section 303(d)(4)(B) of the Clean Water Act) allows effluent limitations to be revised only if the revisions are subject to and consistent with the EPA's antidegradation policy.

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40 CFR 131.12 contains the federal antidegradation policy and procedures, and requires states with approved programs to be consistent with the federal antidegradation requirements.

40 CFR 132 Appendix E contains antidegradation procedures for discharges of certain pollutants to the Great Lake Basin.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

The Department expects moderate economic impacts as a result of this rule. The economic impact of this rule package is dependent on the approach selected. Selection of the waterbody-by-waterbody approach would allow the Department to focus where antidegradation reviews are required. Reviews would only be needed for new/increased discharges that would significantly lower the water quality of the waters determined to be high quality. Selection of the parameter-by-parameter approach would allow the Department to implement the same process for all waters. Reviews would be needed for new/increased discharges of parameters where water quality is better than necessary to support uses. As part of this rule package, both approaches will be evaluated to ensure that the selected approach provides adequate protection to the State's waters while minimizing economic impacts. Businesses, industries, and municipalities that discharge to surface waters and hold a WPDES permit or may obtain a WPDES permit in the future may be affected by this rule. The Department will solicit public input on the projected economic impact and will convene an advisory group to provide input on the proposed rule modifications.

9. Anticipated number, month and locations of public hearings:

The Department anticipates holding 2 public hearings in the month of December 2018. Hearing cities will be: Madison and Wausau or Eau Claire (or other as appropriate).

The Department will hold these hearings in these locations to receive input from affected parties based in the Madison area and at a centrally located city in the state.

Contact Person:

Sarah Yang
Environmental Toxicologist
Bureau of Water Quality
Wisconsin Department of Natural Resources
608-266-9262
sarah.yang@wisconsin.gov